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LEGISLATIVE UPDATES

CONGRESS DROPS THE BALL AGAIN: BASEBALL'S ANTITRUST EXEMPTION REMAINS IN PLACE

I. INTRODUCTION

The loss of the 1994-95 baseball season has had a demoralizing effect on all of America, including members of Congress. Because of the strike, the players and the American public have turned to Congress to take action and Congress has felt the pressure. In its past session, Congress took a significant step toward passing legislation to remove baseball's antitrust exemption, but the Congressional session ended without action.¹ Professional baseball's exemption from the antitrust laws has been on shaky legal ground since its inception in 1922.² In fact, in 1971, the Supreme Court made it clear that the task of eliminating the exemption was in Congress' hands.³ Since the Court's 1971 ruling, various bills have been introduced in the Senate and the House to remove or at least limit the exemption. However, even with the pressures of the current strike, Congress has dropped the ball and failed once again to pass legislation to lift the exemption.

This update will first examine the background of the federal antitrust laws, the three Supreme Court decisions that initiated and reaffirmed baseball's unique exemption, and the events culminating in the 1994 strike. Second, the recently proposed Senate and House bills will be examined in detail including the procedural, substantive and remedial aspects of the bills. Finally, the impact on the sports and entertainment world will be analyzed, including the consequences to baseball once the strike is over.

II. BACKGROUND

The federal antitrust laws, including the Sherman Antitrust Act of 1890,⁴ were implemented to protect trade and commerce from monopolies and from any conspiracy that would hinder a freely competitive market. There are two relevant provisions of the Sherman Antitrust Act that in theory would apply to profession-

1. The proposed legislation analyzed in this update includes: (1) S. 500, 103rd Cong., 1st Sess. (1993) (Professional Baseball Antitrust Reform Act); (2) H.R. 4994, 103rd Cong., 2d Sess. (1994) (Baseball Fans and Communities Protection Act of 1994); and (3) S. 2380, 103rd Cong., 2d Sess. (1994) (Baseball Fans Protection Act of 1994).

2. 139 CONG. REC. S2416-02 (daily ed. Mar. 4, 1993) (statement of Senator Metzenbaum).

3. *Flood v. Kuhn*, 407 U.S. 258 (1972).

4. 15 U.S.C. §§ 1-7 (1994).

al baseball.⁵ First, the Act makes “conspiracies to contract that unreasonably restrain trade in interstate commerce” unlawful.⁶ Second, the Act “prohibits conduct that monopolizes interstate commerce.”⁷ However, since the Supreme Court’s decision in 1922, professional baseball has enjoyed an exemption to the antitrust laws.⁸

In 1922, the issue was first presented to the Supreme Court in the case of *Fed. Baseball Club of Baltimore v. Nat’l League of Prof. Baseball*.⁹ In an opinion written by Justice Holmes, the Court held that the antitrust laws did not apply to baseball because it was a sport and therefore could not be considered interstate commerce.¹⁰ Because baseball was considered to be a game and not a business, the antitrust laws could not be applied to protect the players from the owners.

In 1953, this issue was revisited in the case of *Toolson v. NY Yankees*¹¹ where Holmes’ decision was affirmed, but not on the basis that baseball was not interstate commerce. This time, the Court stated that Congress had no intention of including the business of baseball within the scope of the antitrust laws, and reaffirmed the exemption based on that Congressional intent.

In *Flood v. Kuhn*,¹² the Supreme Court revisited the issue for a third and final time. However, this decision was based on even shakier legal reasoning than the Court’s deference to Congressional intent in *Toolson*. The court openly admitted that “[p]rofessional baseball is a business and it is engaged in interstate commerce,”¹³ as everyone had realized for decades. Then why would not the antitrust laws apply to the business of baseball? The Court concluded that the antitrust exemption should be removed, but by Congress and not the Supreme Court.¹⁴

The antitrust exemption is only enjoyed by one professional sport, baseball. The only rationale that supports the continuing existence of baseball’s exemption can be found in the Supreme Court’s *Toolson* opinion. Decisions affecting baseball are of the utmost importance to the American public. Therefore, many people believe that it is Congress’ role to implement such an important decision because it is the representative body of the American public. The dissent in *Toolson* conceded that due to “the high place it [baseball] enjoys in the hearts of our people and the possible justification of special treatment . . . the authoriza-

5. Latour Rey Lafferty, *The Tampa Bay Giants and the Continuing Vitality of Major League Baseball’s Antitrust Exemption*, 21 FLA. ST. U. L. REV. 1271, 1273 (1994).

6. *Id.* at 1274.

7. *Id.*

8. *Fed. Baseball Club of Baltimore v. Nat’l League of Prof. Baseball*, 259 U.S. 200 (1922).

9. *Id.*

10. See Julie Dorst, *Franchise Relocation: Reconsidering Major League Baseball’s Carte Blanche Control*, 4 SETON HALL J. SPORT L. 553 (1994), at n. 10.

11. 346 U.S. 356 (1953).

12. 407 U.S. 258 (1972).

13. *Id.* at 282.

14. *Id.* at 285.

tion of such treatment is a matter within the discretion of Congress.”¹⁵ However, Congress has not acted to remove the exemption, even with the pressures of numerous strikes over the years.¹⁶

The present baseball strike began on August 12, 1994 as a result of bitter disagreements between players and owners, including disputes over a proposed salary cap by the owners. Before exploring the arguments to remove the exemption, it is necessary to examine how the exemption affects professional baseball in practice. The exemption allows the owners to corner the market on franchises and broadcasting, decreases mobility in the marketplace and allows owners to restrict player mobility through collective bargaining agreements.¹⁷ Moreover, it leads to unfair labor struggles between the players and the owners because the players are powerless to seek redress in the federal court system, if they feel they are being oppressed.¹⁸ The players, therefore, have but one remedy, namely to STRIKE.

There are three basic arguments made on behalf of the players in support of eliminating the antitrust exemption. First, the removal of the exemption will end the strike and baseball can be played again. By providing a forum in the federal courts, the players would not be forced to strike because they could take their labor grievances to court.

Second, a legal argument can be made that Congress passed the antitrust laws to regulate businesses engaged in interstate commerce and that there is no legal basis for Congress to allow baseball to continue to be singled out for an exemption. In fact, *Flood* settled the question that baseball is interstate commerce and that the longstanding exemption is a legal anomaly because there was no justification for excluding a business engaged in interstate commerce from the antitrust laws.¹⁹ The Supreme Court justified its decision due to the importance of *stare decisis* and shifted the obligation to act onto Congress.²⁰ “Major league baseball is a vast, complex organization of multi-million dollar franchises, broadcast rights and concession deals” and this is precisely the type of big business that Congress typically regulates under the antitrust laws.²¹ Therefore, by not eliminating the baseball exemption, Congress is perpetuating an anomaly. Congress should repeal the exemption and put baseball on equal footing with the other professional sports and big businesses.

Finally, the players argue that the artificial restriction of supply enjoyed by the owners is contrary to public policy.²² This argument is threefold: first, “the

15. *Toolson*, 346 U.S. at 364.

16. See Robert G. Berger, *After the Strikes: A Reexamination of Professional Baseball's Exemption From the Antitrust Laws*, 45 U. PITT. L. REV. 209 (1983).

17. Dorst, *supra* note 10, at 588.

18. *Antitrust Exemption Lives For Now*, CHI. TRIB., Oct 1, 1994, at A2.

19. *Flood*, 407 U.S. at 258.

20. *Id.*

21. 139 CONG. REC. at S2416-02, 2420 (statement of Senator Graham).

22. See Dorst, *supra* note 10, at 587, n.238 (quoting statement of Richard B. Dodge, St. Petersburg Assistant City Manager). See also 139 CONG. REC. at S2419 (statement of Sen. Metzenbaum).

artificially inflated value of a franchise creates tremendous pressure upon competing communities to subsidize the teams through rent concessions and uneconomic leases."²³ This makes it difficult for smaller communities to sustain a professional baseball team in their hometown. Second, the antitrust exemption permits competing communities to drive up the value of an existing franchise which makes it difficult for a community to obtain a franchise.²⁴ Finally, it allows the business of baseball to be conducted in complete secrecy without any accountability to the public because there are no external controls on what management is permitted to do.²⁵

In 1993 and 1994, Congress proposed legislation to remove, or at least limit the antitrust exemption. The provisions of three of these proposed bills will be analyzed along with their potential impact on the sports and entertainment world.

III. THE PROPOSED LEGISLATION

Many argued that the 1994-95 baseball season could be salvaged only if Congress would take the problem into its own hands and legislate.²⁶ However, the 103rd Congressional session ended without implementing legislation that would limit or eliminate the exemption. The three proposed bills that will be examined in this update are the Professional Baseball Antitrust Reform Act of 1993,²⁷ the Baseball Fans Protection Act of 1994²⁸ and the Baseball Fans and Communities Protection Act of 1994.²⁹ The proposed legislation gained some support in both the House and the Senate, but all three acts were withdrawn or abandoned due to lack of time or support.

Passing legislation to remove the exemption is difficult due to the political nature of the issue. Congress is influenced by the lobby of the team owners and the necessity of keeping business persons happy.³⁰ In addition, members of Congress are necessarily influenced by the possibility of their hometown teams leaving, a likely consequence if the owners and managers of professional baseball teams become susceptible to antitrust challenges in court and are consequently no longer able to control the alienability of their franchises.³¹

Therefore, baseball's exemption could be an important domestic issue on the Congressional agenda in its next session. A revamped Congress is sure to revisit the issue next year if the strike is not resolved.³² The proposed bills that are the

23. *Id.*

24. *Id.*

25. *Id.*

26. See Mark Maske, *Congress Halts Efforts On Antitrust Exemption*, WASH. POST, Oct. 1, 1994, at B3; see also Bob Klapisch, *Change in a Changing World*, SPORTING NEWS, Oct. 10, 1994, v. 218, at 36.

27. S. 500, 103rd Cong., 1st Sess. (1993).

28. S. 2380, 103rd Cong., 2d Sess. (1994).

29. H.R. 4994, 103rd Cong., 2d Sess. (1994).

30. 139 CONG. REC. at S2417 (statement of Senator Metzenbaum).

31. *Id.*

32. *Congress to Hold Hearings on Strike*, N.Y. TIMES, Oct. 4, 1994, at B13.

subject of this update should provide a basic understanding of the type of legislation that Congress is likely to introduce in January.

A. *THE PROFESSIONAL BASEBALL ANTITRUST REFORM ACT OF 1993*

The Professional Baseball Antitrust Reform Act was introduced on March 4, 1993 by Senator Howard Metzenbaum.³³ The express purpose of the act was to provide that professional baseball teams and leagues composed of such teams would be subject to the antitrust laws.³⁴ Senator Metzenbaum stated that the bill was not designed to punish or threaten the owners, but to benefit the public, fans and the sport itself.³⁵ In his introductory remarks before the Senate, Mr. Metzenbaum stated, "As a legal matter, the basis for baseball's antitrust exemption is insupportable. The question is whether there is some overriding policy reason to continue to allow baseball to be totally exempt from the antitrust laws".³⁶ He concluded that there was not.³⁷

The procedural aspects of the proposed bill involved amending the antitrust laws to reverse the Supreme Court's trilogy of cases granting and reaffirming the exemption. The bill proposed amendment of the Clayton Act³⁸ by adding the language "Except as provided in Public Law 87-331,³⁹ the antitrust laws shall apply to the business of organized professional baseball." The provisions and amendments made by the Act were designed to take effect one year after its enactment.

However, S. 500, as predicted, did not pass.⁴⁰ The last action date on the bill was June 23, 1994, when the bill was stalled indefinitely because the Senate Judiciary Committee failed to approve it for reporting.⁴¹

The difficulty that the proponents of the bill had in obtaining support was exemplified by Senator Wellstone's "inner conflict" in withdrawing his support for S. 500. He stated, "Baseball holds a unique place in our culture as well as in our economy. It is one of the great American pastimes and I would be remiss if I did not give this issue greater thought and consideration."⁴² Although S. 500 failed in its attempts, the Senate revisited the issue on August 11, 1994, one day

33. Senator Metzenbaum is a Democrat from Ohio and a long-time proponent of eliminating the antitrust exemption for baseball. Senator Metzenbaum retires at the end of 1994. *Baseball Congress*, THE SPORTS NETWORK, Sept. 30, 1994.

34. S. 500, 103rd Cong., 1st Sess. (1993).

35. 139 CONG. REC. at S2416 (statement of Senator Metzenbaum).

36. 139 CONG. REC. at S2417.

37. *Id.*

38. 15 U.S.C. § 12 (1994).

39. 15 U.S.C. § 291 (1994), (commonly known as the Sports Broadcasting Act of 1961). The exception mentioned here is beyond the scope of this analysis.

40. See S. 500, 103rd Cong., 1st Sess. (1993) (Information for Public Affairs on Bill Number S. 500), which estimates the likelihood that a given bill will pass at each stage in Congress. The predictions for this bill were as follows: Senate Committee on Judiciary (29%); House Committee (16%); Senate Floor (21%); House (15%).

41. 140 CONG. REC. D726-01 (daily ed. June 23, 1994).

42. 139 CONG. REC. S12744 (daily ed. Sept. 29, 1993).

before the strike.

B. S. 2380, BASEBALL FANS PROTECTION ACT OF 1994 AND H.R. 4649

The Baseball Fans Protection Act of 1994⁴³ (the "Act") was introduced on August 11, 1994, by Senator Metzenbaum with the express purpose of encouraging negotiations between the major league baseball players and the owners "in order to prevent a strike by the players or a lockout by the owners so that fans will be able to enjoy the remainder of the baseball season, the playoffs and the World Series."⁴⁴ However, it seems impossible to ignore the type of message that Congress was trying to send to the owners, namely that Congress might act if the owners did not. Senators Metzenbaum and Hatch proposed attaching the Act as an amendment to H.R. 4649, a District of Columbia appropriations bill in an attempt to get the Act passed by the end of the 1994 Congressional session.⁴⁵

Implementation of the Act would not have repealed the antitrust exemption altogether, but would have provided for the application of the antitrust laws to professional baseball in exceptional and extraordinary circumstances.⁴⁶ The Act applied the antitrust laws to any unilateral terms imposed in baseball labor negotiations in the absence of a contract.⁴⁷ Therefore, the players would have been granted their day in court if the owners unilaterally imposed a salary cap.

However, just as in 1993 S. 500 failed to gain the support of the Senate, this Act was withdrawn just before the 103rd session closed in October of 1994. Bud Selig, the commissioner of baseball, boasted that the Act "would have been defeated by about a two-thirds majority of the Senate."⁴⁸ Although his prediction was probably accurate, the hearings and publicity that revolved around the proposed Act had a significant impact on Congress and on the likelihood of removing the exemption in the future.

The Baseball Fans Protection Act of 1994 had a more direct impact than S. 500 for two reasons. First, because time was of the essence, the Act's proponents got the rest of Congress' attention by attempting to attach the Act to the District of Columbia appropriations bill. Without opposition, this action would have been immediate. Additionally, unlike S. 500, which was proposed a year and a half before the strike, Congress was concerned with remedying the immediate problem posed by the strike.⁴⁹ Congress' attempt to do something quickly by intro-

43. The text of the Act appears as S. 2380 and as a proposed amendment No. 2601 to the House amendment to the Senate amendment number 12 to H.R. 4649.

44. S. 2380. (S. 2380 was co-sponsored by two Democrats (Senators Feingold and Pell) and one Republican (Senator Pell)).

45. 140 CONG. REC. S13888-01 (daily ed. Sept. 30, 1994).

46. S. 2380, *supra* note 1.

47. *Id.*

48. Mark Meske, *Congress Halts Efforts on Antitrust Exemption*, WASH. POST, Oct. 1, 1994, at B3.

49. S. 500 was introduced in March of 1993, but was not voted on in the Senate Judiciary Committee until June of 1994.

ducing the Act, although futile, indicated its willingness to legislate in this area. The message was clear that the owners had received "a wake up call" and that Congress was ready to act if there was not a resolution by the next Congressional session.⁵⁰

The second result of the proposed Baseball Fans Protection Act of 1994 was the impact on the American public due to the publicity the proposed legislation received in the media. The American people wanted baseball to be played in 1995 and many Americans supported and continue to support a Congressional role in ending the strike.

C. H.R. 4994 BASEBALL FANS AND COMMUNITIES PROTECTION ACT OF 1994

Unlike The Baseball Fans Protection Act of 1994 and s. 500, H.R. 4994 was introduced by Representative Mike Synar, in the House of Representatives, six days *after* the baseball strike of 1994.⁵¹ Its purpose was specifically to end the 1994 strike, not just to prevent labor disputes between the players and avoid a future strike. The express purposes of the proposed Act were first, to apply the antitrust laws of the U.S. to the major baseball league in exceptional and extraordinary circumstances; second, to encourage serious negotiations between the players and the owners; and finally, to prevent the suffering of economic losses by those whose livelihood depends on professional baseball.

Procedurally, the Act was designed to function in essentially the same manner as The Baseball Fans Protection Act of 1994 by applying the antitrust laws to professional baseball in exceptional and extraordinary circumstances. However, H.R. 4994 was unquestionably more successful in terms of Congressional support than the earlier proposed bills. A few days before the end of the Congressional session, the House Judiciary Committee voted in favor of the proposed exemption.⁵² The voice vote marked the first time that a congressional committee has acted against the antitrust exemption.⁵³ However, the Congressional session ended before any further action was taken. Although Congress failed to eliminate the exemption, H.R. 4994's proponents were probably content that the bill had "put the league and the players on notice that the antitrust exemption is on its deathbed."⁵⁴

Although Congress failed to legislate and remove the antitrust exemption this past session, its diligence and increased support for legislation indicated that bills much like the three examined in this update will be seen on the Senate and

50. Mark Maske, *Congress Halts Efforts on Antitrust Exemption*, WASH. POST, Oct. 1, 1994, at B3 (quoting Senator Orrin Hatch). Senator Hatch co-sponsored S. 2380.

51. Representative Synar is a Democrat from Oklahoma. The co-sponsors of H.R. 4994 are Republican Representatives Bilirakis and Bunning and Democrat Representatives Owens, Gorgon, Williams, Sanders.

52. Robert L. Jackson, *Threat to Antitrust exemption; Baseball: Congressional Committee approves legislation that would partly remove protection of owners from suits by players*, L.A. TIMES, Sept. 30, 1994, at 1.

53. *Id.*

54. *Id.* (quoting Representative Synar).

House floor again when a revamped Congress reconvenes.

IV. THE IMPACT ON THE SPORTS AND ENTERTAINMENT WORLD

The impact of Congress' failure to legislate and lift or limit the antitrust exemption is clear; there was no 1994-95 World Series and there is no end in sight for the strike. America's favorite pastime is on permanent hold. This spring the antitrust exemption will undoubtedly be a hot topic on the floor of Congress. Therefore, it is worth examining what effect removing the antitrust exemption altogether or limiting the exemption to exceptional and extraordinary circumstances would have on professional baseball.⁵⁵

A. THE IMPACT OF ELIMINATING THE EXEMPTION ALTOGETHER

If professional baseball becomes subject to the antitrust laws, several of the advantages that the management has traditionally enjoyed might be lost.⁵⁶ First, baseball may lose its ability to keep franchises from being transferred or to prevent new franchises from being started.⁵⁷ In the past, baseball's exemption allowed owners to operate as a legal monopoly and create tremendous economic pressures on communities to either sustain or to obtain a franchise.⁵⁸ If baseball no longer has an exemption, smaller communities with less economic power might not be able to afford a team. Management would lose its economic advantages to limit transferability. Second, players would gain bargaining power that they have traditionally lacked. As a result, it is unlikely that the players would be forced to submit to a unilaterally imposed salary cap, an issue of paramount importance in the current strike. Undoubtedly, management would lose the control that it has enjoyed for so long and would be forced to change its bargaining strategy or battle it out in court.

Although this sounds like putting the players and owners on equal footing and bringing fairness into the picture, some have argued that the exemption should not be lifted because it will change the face of baseball as Americans have known it and lead to unnecessary court battles.⁵⁹ While this argument had some merit in the past, we are now faced with a decision between the strike (no baseball) and changing the game to put the players and management on more equal footing. There is no question that America wants baseball.

Supporters of the players argue that eliminating the antitrust exemption alto-

55. S. 500 is an example of legislation that would eliminate the antitrust exemption altogether. The Baseball Fans Protection Act of 1994 and H.R. 4994 are examples of legislation that would limit the exemption to exceptional and extraordinary circumstances.

56. Jeffrey A. Durney, *Fair or Foul? The Commissioner and Major League Baseball's Disciplinary Process*, 41 EMORY L.J. 581, 621 (1992).

57. According to the Major League Rules, to transfer ownership, there must be a vote of three-fourths of the owners in that league. With the exemption, there is no recourse to challenge such a rule in federal court. See Durney, *supra* note 56, at 621.

58. Dorst, *supra* note 10, at 588.

59. *Id.*

gether would accomplish three significant objectives: first, it would end the strike; second, it would put the players on equal footing with management; and finally, it would satisfy America's interests in baseball as both a sport and a business. However, limiting the exemption would only achieve one of these objectives, namely ending the strike.

B. THE IMPACT OF LIMITING THE ANTITRUST EXEMPTION TO EXCEPTIONAL AND EXTRAORDINARY CIRCUMSTANCES

The arguments for limiting the antitrust exemption are less compelling than those for removing the exemption altogether. First, although limiting the exemption may result in an end to the current strike, this would only be a temporary solution to the problem. Second, since there is no legitimate basis for continuing the exemption, limiting the exemption ignores the reality that the exemption stands on faulty ground. Finally, limiting the exemption ignores the public interest surrounding this issue.

Limiting the antitrust exemption to exceptional and extraordinary circumstances would only be a temporary solution. It may result in an end to the current strike because it would give the players an opportunity to go to court to settle this labor dispute, but it would fail to go the extra mile and put the players on equal footing with management with respect to bargaining or negotiating power. For example, if passed, The Baseball Fans Protection Act of 1994⁶⁰ would only apply in the event that a unilateral term or condition is imposed by any party that has been subject to an agreement between the owners of major league baseball and the labor organization representing the players of professional baseball. Therefore, the issue inevitably would be revisited in the future.

Additionally, if legislation simply limiting the exemption was passed, a significant legal anomaly would still exist. Congress passed the antitrust laws to regulate those engaged in interstate commerce. Because baseball is, and has been recognized as interstate commerce,⁶¹ there is no legal basis for baseball's exemption. Merely limiting the exemption would only expose baseball to the antitrust laws when a court determines the situation to be "exceptional and extraordinary". This is not the type of remedy that will solve the legal anomaly of granting unequal treatment to baseball without a justifiable reason. Congress' original intent in enacting antitrust legislation was to protect an open, competitive market. This intent would still be ignored if legislation limiting the exemption were to be passed because a court would have to direct that a circumstance warranted application of the antitrust laws.

Furthermore, the public interest would not be served by implementing the legislation. The legislation would do nothing to remedy the continual conflict of franchise mobility and its economic impact on America's fans and communities. More importantly, the legislation fails to solve the problem that the operation of baseball franchises is conducted in complete secrecy without any accountability

60. 140 CONG. REC. at S13888.

61. *Flood*, 407 U.S. at 258.

to the American public.⁶² Limiting legislation would only be a temporary and fact-specific remedy. The legislation may end the strike, but it would be a failure in many other respects. Therefore, Congress' inquiry this spring should be two-fold: First, should we legislate and end the strike and second, should we implement a temporary solution or remove the exemption altogether. If the strike has not ended by the time Congress reconvenes in 1995, the answer to the first inquiry will most likely be yes. America wants to have baseball. The only question is whether Congress will opt for the temporary solution, or whether it will solve the problem permanently.

V. CONCLUSION

"The stadiums are silent now, pitiful and empty. The only noise baseball makes comes from Washington, where players and owners wrestle in front of Congress. The legislature wonders how to resolve this crazy strike, and every day the nation asks the same question: Is peace hopeless?"⁶³ The 103rd Congress, in the fall of 1994, dropped the ball and failed to legislate to end the strike, but the issue will again emerge in 1995 if the strike does not end. Congress will again analyze whether or not to lift or limit the antitrust exemption, and perhaps finally pass legislation like the proposed Acts that were analyzed above. Only time will tell, but it seems that the antitrust exemption has outworn its welcome.

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62. *Id.*

63. Bob Klapisch, *Change in a Changing World*, SPORTING NEWS, Oct. 10, 1994, v. 218, at 36.
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